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INTRODUCTION

At the Court’s invitation (ECF No. 59), the United States respectfully submits this *amicus curiae* brief in support of the 1855 Treaty boundaries of the Yakama Reservation, which include Tract D and have never been diminished.

The Yakama Reservation was guaranteed as a homeland for the Confederated Tribes and Bands of the Yakama Nation in an 1855 Treaty with the United States, negotiated on behalf of the United States by Isaac Stevens, the Governor of the Washington Territory. In that Treaty, the Tribe agreed to cede approximately 10 million acres of land to the United States, while retaining a much smaller Reservation. After transmitting the Treaty back to Washington, federal officials misplaced the “Treaty Map” that had accompanied the negotiation and signing of the Treaty, leading to confusion and disputes over the Reservation’s boundaries.

The present case is about the proper location of the southwestern boundary of the Yakama Reservation, and whether that boundary includes within it a section of land known as “Tract D.” There is an undisputed *southern* boundary that runs from the Yakima River, on the eastern boundary of the reservation, westward to a point known as “Grayback Mountain” on the southern boundary of the Reservation. But Grayback Mountain is still approximately 20 to 25 miles from Mount Adams and the main ridge of the Cascade Mountains. The question, therefore, is whether the southwestern border of the Reservation forms a straight southeastern line from Mount Adams to Grayback Mountain (which would exclude Tract D), or follows the natural ridge south and then east of Mt. Adams, via a “spur,” to Grayback (which would include Tract D).

From the United States’ perspective, this issue has long been resolved. The Department of the Interior (“DOI”)—which has statutory authority to survey reservation boundaries—has included Tract D within the Yakama Reservation

1 since the early 1930s, after the Treaty Map was located and DOI recognized that
2 earlier surveys did not comport with the Treaty, the intent of the signers, or the
3 topographic features on the ground. DOI officials concluded in 1932 that the
4 boundary extended along a natural ridge south and then east of Mt. Adams, via a
5 well-defined “spur,” to Grayback Mountain, inclusive of Tract D. This boundary
6 was then litigated at length in the 1960s before the Indian Claims Commission
7 (“ICC”), which unequivocally held that Tract D falls within the 1855 Treaty
8 boundaries of the Reservation. And in 1972, President Nixon issued an Executive
9 Order returning 21,000 acres of federal land within Tract D to Yakama Nation
10 title, expressly based on the understanding that the Reservation included Tract D.

11 DOI included Tract D within the Yakama Reservation in its 1981 formal
12 cadastral survey, and in the physical monumentation of its boundaries. This 1981
13 survey continues to represent the official position of DOI regarding the
14 reservation boundary. *See* Shaw Decl., Ex. A (BIA map showing surveyed
15 southwestern boundary). In the United States’ view, and as explained further
16 below, this survey comports with the best interpretation of the Treaty and the
17 intent of the parties.

18 **BACKGROUND**

19 The United States understands that the Court is familiar with the factual
20 background surrounding the Tract D dispute, *see* Order Denying Plaintiff’s
21 Motion for Preliminary Injunction at 11-20 (ECF No. 58), and will receive
22 additional evidence on this issue at trial. For this reason, this brief does not
23 provide a comprehensive recitation of the facts, but rather highlights only the most
24 salient facts from the United States’ perspective.

25 **1. 1855 Treaty History and Text**

26 In the Treaty of 1855, “the Yakamas granted to the United States
27 approximately 10 million acres of land in what is now the State of Washington,
28

1 *i.e.*, about one-fourth of the land that makes up the State today.” *Washington*
 2 *State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007 (2019) (citing
 3 Treaty Between the United States and the Yakama Nation of Indians, art. 1, June
 4 9, 1855, 12 Stat. 951 (Trial Exhibit 6)).¹ In return, the United States paid the
 5 Yakamas \$200,000 and agreed to make certain improvements on the remaining
 6 Yakama land. Tr. Ex. 6, arts. 3-4. The Yakama Nation also reserved certain lands
 7 and rights for itself. 139 S. Ct. at 1007. In particular, the Treaty established the
 8 Yakama Indian Reservation, described as follows:

9 There is, however, reserved, from the lands above ceded
 10 for the use and occupation of the aforesaid confederated
 11 tribes and bands of Indians, the tract of land included
 12 within the following boundaries, to wit: Commencing on
 13 the Yakama River, at the mouth of the Attah-nam River;
 14 thence westerly along said Attah-nam River to the forks;
 15 then along the southern tributary to the Cascade
 16 Mountains; thence southerly along the main ridge of said
 17 mountains, passing south and east of Mount Adams, to
 18 the spur whence flows the waters of the Klickitat and
 19 Pisco Rivers; thence along said divide to the divide
 20 separating the waters of the Satass River from those
 21 flowing into the Columbia River; thence along said
 22 divide to the main Yakama, eight miles below the mouth
 23 of the Satass River; and thence up the Yakama River to
 24 the place of beginning.

18 Tr. Ex. 6, art. 2. The Treaty also provided that the tract “shall be set apart and, so
 19 far as necessary, surveyed and marked out....” *Id.*

20 **2. Early Survey History of the Yakama Reservation**

21 In 1861 surveyors Berry and Lodge defined the Reservation’s southern
 22 boundary from a portion of the Yakima River (the eastern boundary of the
 23 Reservation) to the southeastern corner of the Reservation, then westerly along the
 24

25
 26 ¹ Where possible, the United States has cited to the Trial Exhibits identified by the
 27 parties. *See* Plaintiff’s Witness and Exhibit List (ECF No. 61); Defendants’ Trial
 28 Witness and Exhibit Lists (ECF No. 62).

1 southern border to Grayback Mountain. Tr. Ex. 83 at YN 507; Tr. Ex. 80
2 (Berry/Lodge survey map). The southeastern and southern boundary was
3 surveyed again in 1885 by Harry Clark. Tr. Ex. 46 at YN 332 (1966 ICC Findings
4 of Fact); Tr. Ex. 85 at YN 1041; Tr. Ex. 83 at YN 507.

5 No attempt was made to survey the remainder of the southern boundary or
6 any portion of the western boundary for more than thirty years after the Treaty
7 signing, until George E. Schwartz surveyed the south and west boundary of the
8 Reservation in 1890. Tr. Ex. 76 at 11. Schwartz admitted that he departed from
9 Treaty text, which placed the western boundary along the main ridge of the
10 Cascade Mountains. *Id.* at 12. But because the Treaty did not expressly call for
11 crossing the Klickitat River, Schwartz terminated the southwestern corner east of
12 the Klickitat River, and substantially east of the Cascades. Tr. Ex. 85 at YN 1041;
13 *see also* Tr. Ex. 35 at 2 (U.S. Geological Survey Map showing survey lines); Tr.
14 Ex. 79.

15 In response to the Yakamas' dissatisfaction over the Schwartz survey, Tr.
16 Ex. 76 at 10, E.C. Barnard, a topographer of the United States Geological Survey,
17 revisited the Reservation boundaries. On the western boundary, rather than
18 proceeding "southerly along the main ridge" of the Cascade Mountains, and then
19 passing "south and east of Mount Adams" to a "spur," as called for in the Treaty,
20 Barnard ran two arbitrary straight lines, both entirely east of the main ridge of the
21 Cascade Mountains. *Id.* at 9. The first went from Spencer Point to what he called
22 "a conical hump," or Goat Butte, northeast of Mount Adams. Tr. Ex. 79. The
23 second went from that hump directly southeast to Grayback Mountain. Tr. Ex. 76
24 at 9.

25 Like Schwartz, Barnard's own report in 1900 admitted that his line did not
26 conform to the calls in the Treaty text. *Id.* at 8, 12. Barnard recognized that,
27 "[t]he important clause of this treaty is that the summit of the Cascade Mountains
28

1 should form a part of the western boundary.” *Id.* at 8. But he drew his straight-
2 line boundary east of the main ridge. Tr. Ex. 46 at YN 334-37. Barnard’s notes
3 acknowledge that he was not able to follow the main ridge from the north towards
4 Mount Adams because of deep snow. Tr. Ex. 76 at 7.

5 These surveys were conducted without the benefit of the Treaty Map.
6 During these early surveys, surveyors relied instead on a base map known as “the
7 White Swan” map, which was believed to have been prepared by, or traced from,
8 Governor Stevens in 1857. Tr. Ex. 58 (White Swan map); Tr. Ex. 76 at 8. The
9 White Swan map misrepresented the Reservation boundary, misidentified
10 topographical features, and has now been discredited, particularly after
11 comparison to the actual Treaty Map. *Northern Pac. Ry. Co. v. United States*, 227
12 U.S. 355, 363 (1913) (White Swan map “has many inaccuracies” and “adds to the
13 confusion” of trying to discern the boundaries.)

14 **3. 1904 Act**

15 Even as Yakama tribal representatives continued to dispute the accuracy of
16 these surveys in the late nineteenth century, congressional policy turned towards
17 the allotment, or privatization, of tribal lands previously held in common. The
18 General Allotment Act of 1887 authorized the President to survey and divide
19 tribal lands into allotments for individual Indians. 24 Stat. 388 (Feb. 8, 1887).
20 After being allotted to individual Indians, “surplus” land would then be available
21 for sale to non-Indians.

22 Congress authorized negotiations with Yakama tribal representatives
23 between 1896 and 1901 but failed to reach an agreement to allot the Reservation.
24 Tr. Ex. 20 at 5 (1904 House Report). The Yakama Nation’s concern about the
25 erroneous boundary was a substantial obstacle to any agreement. Tr. Ex. 76 at 5;
26 S. Doc. No. 337, 63rd Cong., 2nd Sess., 155-156 (Dec. 20, 1913). In 1904,
27 Congress enacted a statute “to authorize the sale and disposition of surplus or
28

1 unallotted lands of the Yakima Indian Reservation.” 33 Stat. 595 (Dec. 21, 1904).
 2 That statute directed the Secretary of the Interior “to sell or dispose of unallotted
 3 lands embraced in the Yakima Indian Reservation proper....” *Id.* § 1. The Act
 4 also provided:

5 that the claim of said Indians to the tract of land
 6 adjoining their present reservation on the west, excluded
 7 by erroneous boundary survey and containing
 8 approximately two hundred and ninety-three thousand
 9 eight hundred and thirty-seven acres, according to the
 findings, after examination, of Mr. E.C. Barnard ... is
 hereby recognized, and the said tract shall be regarded as
 part of the Yakima Indian Reservation.

10 *Id.* The statute provided that the proceeds of the land sales would be deposited in
 11 the Treasury for the Tribe’s benefit. *Id.* § 4. Congress also directed the Secretary
 12 of the Interior “to define and mark the western portion of said reservation,
 13 including the adjoining tract of 293,837 acres, to which the claim of the Indians is,
 14 by this Act, recognized....” *Id.* § 8. A survey was then conducted in 1907 by
 15 Campbell, Germond, and Long, which largely tracked the straight-line Barnard
 16 survey, again contrary to both the local topography and text of the Treaty. Tr. Ex.
 17 113 (1933 map depicting survey lines); *see also* Tr. Ex. 35.

18 **4. Northern Pacific Railway Co. v. United States**

19 After the 1904 Act, the United States sought to recover the lands between
 20 the Schwartz and Barnard lines that had been erroneously patented to the Northern
 21 Pacific Railroad Company. *Northern Pac. Ry. Co. v. United States*, 191 F. 947
 22 (9th Cir. 1911), *aff’d* 227 U.S. 355 (1913). “The special controversy in the case
 23 [was] the location of the *western* boundary of the reservation.” 227 U.S. at 359
 24 (emphasis added). The Ninth Circuit concluded that because the location of the
 25 western boundary “along the main ridge of [the Cascade] mountains” is “the most
 26 certain and material call of the description it should prevail,” 191 F. at 955, and
 27 the Supreme Court affirmed. 227 U.S. at 372. The Court did not directly address
 28 the disputed southwestern boundary.

1 Although the Supreme Court expressly endorsed the “correctness of the
2 Barnard survey,” *id.* at 366, much of the Court’s reasoning is inconsistent with the
3 Barnard line, which also never reaches the main ridge of the Cascades that the
4 Court said should form the western boundary. For example, the Court concluded
5 that the western boundary included Mount Adams. *Id.* at 360 (rejecting the
6 railroad’s argument that “the words ‘passing south and east of Mount Adams’
7 qualified the word ‘mountains’,” which would mean that the Treaty intended to
8 identify not *the* main ridge, but only *a* main ridge “passing south and east of
9 Mount Adams”). To effectuate the Supreme Court’s determination, DOI directed
10 Chester Pecore, cadastral engineer, to survey the main divide of the Cascades,
11 which he did between 1920 and 1924. Tr. Ex. 83 at YN 508. Pecore concluded
12 that the western boundary followed a portion of the main ridge of the Cascades,
13 thus corresponding to the calls of the Treaty in this area (and including an
14 additional 47,593 acres of land). *Id.* In the southwest, however, Pecore’s
15 boundary was still similar to Barnard’s, beginning at the same conical hump, Goat
16 Butte, northeast of Mount Adams, and continuing to Grayback via slightly
17 different straight lines. *Id.* at YN 508, YN 515; Tr. Ex. 35.

18 **5. The Discovery of the Treaty Map and Subsequent Surveys**

19 The original Treaty Map was finally re-discovered in 1930, at which time
20 the Commissioner of Indian Affairs insisted that the General Land Office review
21 its surveyed line. Tr. Ex. 60 at KC 831 (1932 Wilkes Report); Tr. Ex. 85 at YN
22 1041. DOI firmly rejected the notion that the southwestern boundary was settled
23 by the earlier surveys or any action by the courts or Congress. Tr. Ex. 52 at KC
24 820-22. And, although DOI had previously assumed that the Pecore survey
25 identified the correct southwestern boundary, “[b]ased upon the discovery of this
26 map and the long existing claims of the Indians, it became evident to this
27 Department that for the first time an authentic depiction of the exterior limits of
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1 the reservation which Governor Stevens represented to the Indians as the lands on
2 which they were to be located, was available.” *Id.* at KC 823. Thus, DOI opined
3 that a newly designated “Treaty line,” not the Barnard or Pecore lines, more
4 accurately reflected the Treaty. *Id.* at KC 825-26.

5 DOI commissioned a “reconnaissance cadastral and topographic survey”
6 led by cadastral engineer E.D. Calvin, and completed in 1932. Reports submitted
7 the same year showed that there is indeed a well-defined ridge or “spur” running
8 southerly from Mount Adams, thence easterly to Grayback Mountain,
9 “follow[ing] the treaty reading and map as closely as possible when applying
10 present known topography to conditions as the treaty makers understood them to
11 be.” Tr. Ex. 60 at KC 832; *see also* Tr. Ex. 2 (1932 Calvin Report); Tr. Ex. 59
12 (1933 Wilkes Report); Tr. Ex. 85 at YN 1041; Tr. Ex. 1 (Calvin reconnaissance
13 map).

14 By 1939, the Secretary of the Interior had informed Congress that: “[a]s a
15 result of an exhaustive study, extending over a period of years, this Department
16 has heretofore concluded that the boundary claims of the Yakima Indians are
17 meritorious.” Tr. Ex. 85 at YN 1040. More specifically, in a memorandum
18 submitted to the Senate, DOI stated its view “that in order to satisfy the calls of
19 the treaty, this natural boundary [as surveyed by Calvin and Wilkes in 1932]
20 should have been followed in establishing the southwest boundary of the
21 reservation, rather than the straight line arbitrarily drawn to mark the present
22 southwest boundary between Grayback Mountain and Mt. Adams.” *Id.* at 1041-
23 42.

24 **6. Indian Claims Commission**

25 Although the Nation had seen federal recognition of its western boundary
26 march westward to encompass, first, the Barnard line, and then the Pecore line,
27 the Nation continued pressing boundary claims in Congress. Testimony of one
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1 witness in 1939 establishes that, “[s]ince 1911 . . . [the Yakima delegation] had
2 ask[ed] that the southwest boundary of the Yakima Indian Reservation be
3 reestablished, and every year since that . . . they have always said that was part of
4 their reservation.” Tr. Ex. 22 at KC 1386. In 1939, the Nation succeeded in
5 bringing to committee a special jurisdictional bill that would have given the
6 Nation access to the courts to assert its continued claim to “additional lands
7 southwest of their present reservation,” but the bill did not pass. Tr. Ex. 44 at YN
8 556 (1939 House Report enclosing a March 7, 1939 letter from the Attorney
9 General).

10 Congress passed the Indian Claims Commission Act of 1946, 60 Stat. 1049
11 (Aug. 13, 1946), to establish an Indian Claims Commission to deal once and for
12 all with tribes’ claims against the United States. *See United States v. Dann*, 470
13 U.S. 39, 45 (1985). The ICC was authorized to grant money damages, but not title
14 or equitable relief. *E.g., United States v. Mitchell*, 445 U.S. 535, 539 (1980). In
15 1949, the Yakama Nation petitioned the ICC alleging, in part, that lands in Tract
16 D were properly reservation lands and had been sold without compensation to the
17 Nation. *See Yakima Tribe v. United States*, 158 Ct. Cl. 672, 676 (1962). As in
18 many other ICC cases, therefore, determining the correct reservation boundary
19 was a prerequisite for monetary relief.

20 In an effort to avoid this liability, the United States argued that the
21 boundary was conclusively determined by the Supreme Court in *Northern Pacific*,
22 and therefore excluded Tract D. *See id.* at 680 n.2. That argument was initially
23 accepted by the ICC, but was rejected by the Court of Claims, which found no
24 justification for the ICC’s “unquestioning submission to the Supreme Court’s
25 opinion as controlling in this case.” 158 Ct. Cl. at 679-80. The Court of Claims
26 reasoned that the *Northern Pacific* Court did not decide the specific issue of the
27 southwestern boundary, and in any event, its decision had no preclusive effect on
28

1 the Nation's claims. *Id.* at 681-82. Moreover, the Supreme Court's interpretation
2 of the Treaty calls turned on factual questions for which the proffer of new
3 information provided ample basis for reconsidering the Court's conclusions. *Id.* at
4 681-82. Accordingly, the Court of Claims remanded to the ICC with instructions
5 to "canvass . . . the specialized materials, old and new, which the parties offer, and
6 to decide, with due regard for the opinions in *Northern Pacific*, whether any or all
7 of Tract[] . . . D rightfully formed part of the Yakima Reservation." *Id.* at 682.

8 On February 25, 1966, the ICC concluded that "'Tract D' was intended to
9 be included within the Yakima Reservation." Tr. Ex. 46 at YN 343. To the ICC,
10 the Treaty calls relating to the southwest border appeared "impossible," because
11 they did "not fit the actual topography." Tr. Ex. 47 at YN 352 (1966 ICC
12 Opinion). Of the "new materials" considered, the most pertinent to the ICC was
13 the Treaty Map, which "show[ed] a boundary which extends a considerable
14 distance due south of Mount Adams." *Id.* at YN 347, 355. Although Tract D
15 extended still further south, the ICC found this discrepancy in distance "not at all
16 surprising," and attributed it to the "obvious uncertain knowledge of the
17 topography (particularly in this area)." *Id.* at YN 355. The ICC further concluded
18 that the Tract D boundary best satisfied the Treaty calls and was the intention of
19 the Treaty makers because it followed "a distinct spur which runs southerly and
20 easterly from the southern slopes of Mount Adams." *Id.* at YN 355-56.

21 The takings claim, along with a similar claim elsewhere on the Reservation,
22 was settled for \$2.1 million paid by the United States. Tr. Ex. 45 at YN 390 (1968
23 ICC Final Judgment). The ICC's determination that Tract D "was intended to be
24 included within the Yakima Reservation," Tr. Ex. 46 at YN 343, also set the stage
25 for the Tribe to reclaim title to other unpatented lands in Tract D that had not been
26 transferred to private ownership. In particular, the ICC severed the Tribe's claim
27 to 21,000 acres in the northern portion of Tract D that had been withdrawn by
28

1 Presidential Proclamation in 1907 and were part of Gifford Pinchot National
2 Forest, in order to seek restoration of Indian title. Tr. Ex. 116 (1972 ICC Order
3 Dismissing Claim With Prejudice).

4 **7. Executive Order 11670 restores title to lands within Tract D to the**
5 **Yakama Nation**

6 In January 1969, Secretary of the Interior Udall wrote to the Secretary of
7 Agriculture urging “prompt restoration of the Yakima tribal lands that were
8 erroneously included in the Gifford Pinchot National Forest.” Shaw Decl. Ex. B.
9 After discussions on this issue among the agencies and with the Vice President’s
10 National Council on Indian Opportunity (NCIO), Tr. Ex. 128 (1970 NCIO Internal
11 Memorandum) and Shaw Decl. Exs. B-D, the question of the President’s legal
12 authority to transfer land title was presented to the Attorney General. Attorney
13 General Mitchell issued an opinion addressing whether “some 21,000 acres of
14 land in the State of Washington, which were originally intended to be included
15 within a reservation established by an 1855 treaty with the Yakima Tribe of
16 Indians, but which have been administered by the Forest Service as part of a
17 national forest since 1907, have been ‘taken’ from the Tribe by the United States
18 within the meaning of the Fifth Amendment to the Constitution.” 42 Op. Atty.
19 Gen. 441 (Jan. 18, 1972) (Tr. Ex. 24). If the land was not “taken,” he concluded,
20 title could be restored to the Tribe by Executive action; otherwise, legislation
21 would be required. *Id.* at 441-42.

22 On the legal question, the Attorney General reasoned that a “physical
23 appropriation of private property by the Executive does not result in a Fifth
24 Amendment ‘taking’ for which the United States is liable, unless the Executive
25 action is authorized by Congress” or subsequently ratified by Congress. *Id.* at
26 445-46 (citations omitted). The Attorney General concluded that the taking of
27 *reservation* lands was not authorized by Congress, since the statute authorizing the
28

1 President to reserve forest lands prohibited modification of existing Indian treaty
2 reservations. *Id.* at 447.

3 Relying on the Attorney General's opinion, on May 23, 1972, President
4 Nixon issued Executive Order 11670, "Providing for the Return of Certain Lands
5 to the Yakima Indian Reservation." 37 Fed. Reg. 10431 (Tr. Ex. 25). That
6 Executive Order noted that the 21,000-acre tract was "mistakenly thought to be
7 public land" when made part of the forest reserve, and ordered that the boundary
8 of the Gifford Pinchot National Forest be modified to not include this parcel of
9 land. *Id.* The Executive Order also directed the Secretary of the Interior "to
10 assume jurisdiction over the tract of land ... and to administer it for the use and
11 benefit of the Yakima Tribe of Indians as a portion of the reservation created by
12 the Treaty of 1855, 12 Stat. 951." *Id.* at 10432. As a result, these lands are now
13 held in trust for the Yakama Nation.

14 **8. 1981 Survey**

15 In 1978, the BLM Chief of Cadastral Survey, Oregon State Office,
16 authorized a survey of the southwesterly boundary of the Yakama Indian
17 Reservation. Tr. Ex. 49. BLM Cadastral Surveyor Ronald Scherler began his
18 survey in 1978, joined by nine field assistants, including another land surveyor,
19 surveying technicians, and surveying aids, and completed the survey in 1981. Tr.
20 Ex. 74. Scherler's survey field notes review the history of federal surveys of the
21 area, describe his methodology, and track in detail the survey course along the
22 southwestern boundary, noting angle measurements and the monumentation of
23 boundary corners with iron posts and marked brass caps. *Id.* In 1982, the Chief
24 Cadastral Surveyor of Washington approved Scherler's survey. *Id.* at 102. BLM
25 has not re-surveyed the southwestern boundary of the Yakama Reservation since
26 1981.

ARGUMENT

I. The 1981 Survey Delineates the Official Reservation Boundary.

In the view of the United States, the 1981 cadastral survey by BLM is an accurate reflection of the boundaries of the Yakama Indian Reservation, as established by the Treaty of 1855, and continuing until today. *See* Shaw Decl. Ex. A (map); Tr. Ex. 74. Congress authorized BLM to survey Indian reservations, along with other public lands. 25 U.S.C. § 176 (survey of Indian reservations); *see also* 43 U.S.C. § 2 (Secretary of Interior or his designee to “perform all executive duties appertaining to the surveying and sale of the public lands of the United States”). The BLM also has authority to correct erroneous public land surveys. 43 U.S.C. § 772.

Federal courts have long recognized the need to refrain from second-guessing government surveys. In *Craig v. Powell*, the Supreme Court stated “[t]hat the power to make and correct surveys of the public lands belongs to the political department of the government, and that, while the lands are subject to the supervision of the general land-office, the decisions of that bureau in all such cases . . . are unassailable by the courts, except by a direct proceeding....” 128 U.S. 691, 698-99 (1888); *see also id.* at 699 (noting the “great confusion and litigation [that] would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys”) (citation and internal quotation marks omitted). *Craig* addressed a survey that determined title to public lands, but the animating principles of repose and deference to the expertise of the Executive branch maintain their force here: the Court should refrain from revisiting a nearly forty-year old BLM survey (which is similar to the Calvin survey completed nearly *ninety* years ago), undertaken pursuant to express statutory authority, which reflects the considered views of the Department of the Interior.

1 In contrast, surveys of the southwestern boundary of the Reservation
 2 conducted prior to 1932, though accepted by the General Land Office, could not
 3 effect a diminishment of the Reservation because they are not in accord with the
 4 Treaty or Treaty Map. “[A]n incorrect survey may not be relied upon to reduce
 5 the legal boundaries of an Indian reservation.” *Sekaquaptewa v. MacDonald*, 626
 6 F. 2d 113, 118 (9th Cir. 1980) (citing *Northern Pacific*, 191 F. at 958); *see also*
 7 *Northern Pacific*, 227 U.S. at 373. A government surveyor has “no authority to
 8 exclude any of the reserved lands from the boundaries of the reservation.” *United*
 9 *States v. Romaine*, 255 F. 253, 259 (9th Cir. 1919). Thus, an “error in failing to
 10 extend the survey so as to include the lands in controversy cannot prejudice the
 11 rights of the Indians.” *Id.* (citations omitted). Moreover, BLM retains authority to
 12 correct its prior surveys. 43 U.S.C. § 772.

13 **II. The 1981 Survey Reflects the Best Interpretation of the 1855 Treaty.**

14 In the view of the United States, the 1981 Survey reflects the best
 15 interpretation of the 1855 Treaty. At the outset, we note that Indian treaties
 16 “‘must be interpreted in light of the parties’ intentions, with any ambiguities
 17 resolved in favor of the Indians.’” *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699
 18 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S.
 19 172, 206 (1999)). Moreover, the words of a treaty must be construed “in the sense
 20 in which they would naturally be understood by the Indians.” *Id.* (quoting
 21 *Washington v. Washington State Comm. Passenger Fishing Vessel Ass’n*, 443
 22 U.S. 658, 676 (1979).

23 The 1981 survey best comports with the Treaty text and these principles,
 24 for several reasons.² First, it proceeds “southerly” along the “main ridge of” the
 25

26 ² There is evidence that tribal representatives have long claimed that the
 27 reservation boundary extended well south of Mount Adams. As recounted by the
 28

1 Cascades, a clear Treaty call. Tr. Ex. 6, art. 2. Second, the line proceeds
2 southerly while also passing “south and east of Mount Adams,” which none of the
3 other proposed boundary lines do. Survey lines proffered by Barnard and others
4 departed the main ridge of the Cascades *north* of Mt. Adams (error one), and then
5 drew straight lines “southeast” from a “conical hump” known as Goat Butte to
6 Grayback Mountain (error two). *See, e.g.*, Tr. Ex. 79; Tr. Ex. 83 at YN 515.
7 Regarding error one, the text does not support leaving the main ridge of the
8 Cascades *north* of Mount Adams, for the conical hump at Goat Butte, which is
9 still *northeast* of Mount Adams. Tr. Ex. 79; *see also* Tr. Ex. 60 at KC 830-31
10 (describing “the Conical Hump (Goat Butte)” as “east of Mt. Adams” and saying
11 “[t]here is no logical connection between the treaty and the Barnard survey or that
12 part of the Pecore Survey from where it leaves the summit of the Cascades by way
13 of the Mt. Adams mill and Grayback Peak.”).

14 Regarding error two, the Treaty text uses the term “southeasterly” (or
15 “southeasterly”) in other places to describe true southeastern lines, demonstrating
16 that the drafters knew how to call for a southeastern line when desired. *See* Tr.

18 Ninth Circuit, the federal agent at the Yakima agency in 1889 requested a survey
19 of the southern and western boundary, noting that “it was a subject of disagreement
20 as to which was the ‘main ridge’” of the Cascades referred to in the Treaty, with
21 “the Indians claiming that the main ridge extended to the base of Mt. Adams on the
22 south and east while white men with diverse interests claimed that it was further
23 east.” *Northern Pacific*, 191 F. at 949. Notably, “[a]ll of the country south and
24 east of Mt. Adams for 40 or 50 miles was regarded as part of the Cascade Range,
25 being wholly mountainous....” *Id.* *See also* Tr. Ex. 52 at KC 825 (describing 1930
26 council of Yakima Indians recounting understanding that Camas Prairie was within
27 the Reservation).
28

1 Ex. 6, art. 1. And the Treaty Map confirms true southeastern lines at the places
2 called for in the text. Tr. Ex. 55 (Treaty Map). But the Treaty text describes
3 something different for the southwestern boundary of the Reservation, calling for
4 a line that proceeds “southerly” along the main ridge and passing “south and east
5 of Mount Adams.” Tr. Ex. 6, art. 2; Tr. Ex. 60 at KC 831 (“None of the past
6 surveys have ever passed south and east, not southeast, but south then east of Mt.
7 Adams.”).

8 Third and relatedly, the western boundary must proceed “southerly along
9 the main ridge of said [Cascade] mountains” until reaching a “spur.” Tr. Ex. 6,
10 art. 2. This cannot be done by departing the main ridge prior to reaching Mount
11 Adams, or by cutting east at any other more northerly point, as there is no spur
12 farther north, much less one that could align with the other Treaty calls. *See* Tr.
13 Ex. 60 at KC 832 (“There is no well-defined spur from Mt. Adams to Signal Peak
14 ... the drainages and ridges are all to the southeast....”). Although this line does
15 not follow a “spur whence flows the waters of the Klickitat and Pisco Rivers,” Tr.
16 Ex. 6, art. 2, it does follow a spur that lies between the Klickitat and White
17 Salmon Rivers. There is evidence that the negotiators of the Treaty often
18 confused the various rivers in this area, *see Northern Pacific*, 191 F. at 950, and,
19 adding to the confusion, some maps from this time transposed the Klickitat and
20 White Salmon Rivers, depicting the Klickitat incorrectly lying west of Mount
21 Adams. *See, e.g.,* Tr. Ex. 58; Tr. Ex. 80. The Supreme Court also cautioned
22 against allowing this call to “dominat[e] all other calls,” especially “without
23 attempting to give them all effect from a consideration of the topography . . . and
24 the testimony.” *Northern Pacific*, 255 U.S. at 362 (finding Schwartz erred by
25 insisting that the boundary follow the divide between the Klickitat and Toppenish
26 Rivers).

1 The 1932 and 1981 survey lines also comport with Governor Stevens’
2 representations to tribal leaders during the Treaty negotiation, where he described
3 the western boundary of the Yakama Reservation as proceeding “**down the main**
4 **chain of the Cascade mountains south of Mount Adams**, thence along the
5 Highlands separating the Pisco and the Sattass river from the rivers flowing into
6 the Columbia.” Tr. Ex. 32 at 65 (1855 Treaty Council Record) (emphasis added).
7 Moreover, when transmitting the signed Treaty, Governor Stevens described the
8 Yakama Reservation as “extending from the Yakama River to the Cascades” and
9 “back[ing] up against the Cascades, affording a fine range for roots, berries, and
10 game.” Tr. Ex. 9 at 2 (1855 Stevens Letter); *see also Mille Lacs*, 526 U.S. at 206
11 (Indian treaties to be “interpreted in light of the parties’ intentions, with any
12 ambiguities resolved in favor of the Indians.”).

13 Although contrary to the Treaty text, part of the appeal of the straight
14 southeast Barnard line was that it aligned with statements from tribal members
15 Chief Spencer and Stick Joe. But there is no evidence that either man was at the
16 negotiation or signing of the Treaty, where, among other things, the Treaty Map
17 was displayed to tribal leaders, and the southwestern boundary was described as
18 proceeding south of Mount Adams. *See, e.g.*, Tr. Ex. 542 at KC 4292 (Chief
19 Spencer testifying that he was not at the Treaty negotiation). Indeed, statements
20 by Chief Spencer and Stick Joe were not based on the Treaty Map or any
21 representations by Governor Stevens, but merely repeated post-Treaty statements
22 of federal officials claiming a straight-line boundary. *Id.* at KC 4294-96; Tr. Ex.
23 520 at 7.

24 Chief Spencer and Stick Joe were not alone in their understanding of the
25 Reservation’s southwestern boundary, but neither was their view universal. As
26 DOI noted in 1932, proceedings of a council of Indians held at the Yakima Indian
27 Agency November 26, 1930, indicated that “the Indians have understood from
28

1 traditions handed down to them that the southwest boundary line was to run south
2 to ‘Camas Prairie’ along a well-defined ridge, and that this area was to be within
3 their reservation.” Tr. Ex. 52 at KC 825; *see also* Tr. Ex. 63 at KC 4408 (in 1913,
4 Yakama member reporting that “I know our boundary line is south of Mount
5 Adams.”); Tr. Ex. 54 at KC 784 (1930 DOI letter summarizing Yakama
6 understanding that the boundary line ran “South of Camas Prairie along a well
7 defined ridge, and that Camas Prairie was within their reservation”), KC 788-89
8 (Yakama member Thomas Sam: “Glenwood is inside the Yakima Indian
9 Reservation boundary” and “[t]he line should go through the center of Mt. Adams
10 south to the spur”), KC 794 (Yakama member James Meninick stating that the
11 boundary extends along a spur west of Glenwood).

12 The 1981 survey boundary also comports best with the Treaty Map, which
13 shows the boundary as proceeding south along the main ridge of the Cascades,
14 passing both south and east of Mount Adams, encompassing the spur south of
15 Mount Adams (arguably even further west than the boundary line) and as
16 including a prairie area. *See, e.g.*, Tr. Ex. 55; Tr. Ex. 59 at KC 844 (“[F]rom this
17 [Treaty] map it is apparent that the makers of the treaty intended to take in a large
18 area south of Mt Adams.”): *id.* at KC 845 (“[I]t is clear from the map that
19 [Governor Stevens] intended to include a large tract south of Mt. Adams which
20 would include the area around Glenwood.”).

21 There is a Treaty Map-based counterargument that, because the Reservation
22 is depicted north of the 46th parallel on the map, then Tract D lands—which are
23 mostly south of that parallel—should not be considered part of the Reservation.
24 But the 46th parallel does not appear in the text of the Treaty, nor in the Treaty
25 council discussions, and there is no evidence that Yakamas understood (or would
26 have had reason to consider) its relationship to their reserved lands. *Cf. Fishing*
27 *Vessel Ass’n*, 443 U.S. at 676 (Treaty words must be construed “in the sense in
28

1 which they would naturally be understood by the Indians.” (citation omitted)).
2 Moreover, the argument overlooks other latitudinal and longitudinal inaccuracies
3 in the Treaty Map, for example incorrectly placing Mount St. Helens north of
4 Mount Adams, and incorrectly placing the eastern boundary of the Yakama
5 Reservation significantly east of the 120th degree longitude (whereas the actual
6 eastern boundary sits approximately on that line). *Compare* Tr. Ex. 55 with Tr.
7 Ex. 129 (2017 U.S.G.S. Washington State Map). Finally, the 46th-parallel
8 argument would exclude large portions of undisputed reserved land, including
9 most of the lands along the undisputed southern boundary as identified by the
10 1861 Berry and Lodge survey, and would completely exclude Grayback
11 Mountain, which is also south of the 46th parallel, and which all surveys have
12 consistently placed within the Reservation.

13 **III. The 1981 Survey Reflects the Boundary That Has Been Litigated and**
14 **Settled for More Than Fifty Years.**

15 In addition to the treaty text-based arguments described above, the ICC’s
16 1966 decision that Tract D forms part of the reservation also should carry
17 significant weight. First, it is persuasive authority that *Northern Pacific* is not
18 dispositive of the Nation’s southwestern boundary. Second, it represents the
19 ICC’s considered judgment based on a full review of the evidence, including the
20 first time that any tribunal had evaluated the effect of the Treaty Map. Finally,
21 Congress’s purpose in establishing the ICC was to create repose, and the United
22 States and the Yakama Nation have acted in accordance with its decision for the
23 last 52 years. That precedent should stand.

24 The County has argued—as the United States did before the ICC—that the
25 southwestern reservation boundary was conclusively determined in *Northern*
26 *Pacific*. See ECF No. 43 at 17. But *Northern Pacific* did not address the question
27 presented in this Court, because the dispute there concerned the western and *not*
28

1 the southwestern border. *See* 227 U.S. at 359. As the Court of Claims
2 recognized, “the areas beyond the Barnard line (i.e., outside of the present
3 boundaries) were not then of concern to the Court; its attention was turned the
4 other way.” *Yakima Tribe*, 158 Ct. Cl. at 682. Moreover, *Northern Pacific* did
5 not address or preclude the Nation’s boundary claims against the County, just as it
6 did not preclude the Nation’s claims against the United States before the ICC. *Cf.*
7 *id.* at 681. Like the ICC, this Court has an opportunity to adjudicate the status of
8 Tract D, which was not at issue in *Northern Pacific*, now with the benefit of the
9 Treaty Map, “which was not before the courts in the *Northern Pacific* litigation.”
10 *Id.* at 682.

11 The Court of Claims’ interpretation of *Northern Pacific*, as well as the
12 ICC’s ruling on the merits, are particularly persuasive here because of those
13 tribunals’ unique charge to “dispose of the Indian claims problem with finality.”
14 H.R. Rep. No. 79-1466 at 10. The Nation and the United States vigorously
15 litigated the Tract D issue for seventeen years, *see, e.g.*, Tr. Ex. 47 at YN 356, and
16 the ICC concluded that including Tract D in the reservation was most consistent
17 with the “intention of the treaty makers,” as reflected in the treaty calls and the
18 treaty map, especially in light of the “concession [that] must be made to the
19 understanding of the Indians.” *Id.* at YN 348 (citing *Northern Pacific*, 227 U.S. at
20 362). In particular, the ICC found that the Treaty Map “indicate[d] . . . that the
21 reservation boundary was intended to follow the Cascades passing to the south of
22 Mount Adams before turning east,” and “show[ed] a boundary which extends a
23 considerable distance due south of Mount Adams.” *Id.* at YN 354-55. The ICC
24 concluded that the Tract D boundary satisfied the treaty calls and was the
25 intention of the treaty makers because it followed “a distinct spur which runs
26 southerly and easterly from the southern slopes of Mount Adams.” *Id.* at YN 355-
27 56.
28

1 Although the ICC acknowledged that the spur thus identified was not one
2 from “whence flows the waters of the Klickitat and [Toppenish] Rivers,” it did not
3 find that failing determinative because no spur satisfied both characteristics. *Id.*
4 The ICC concluded that the Campbell boundary “was in error,” because it was
5 based on the erroneous White Swan Map, *id.* at YN 353, and went so far as to say
6 that “we doubt that the earlier surveys would have been so made if the treaty map
7 had then been available.” *Id.* at YN 354. As discussed *infra* Section V, the ICC
8 decision has governed the conduct of the United States and the Nation for half a
9 century. In light of the evident congressional interest in repose, these findings
10 should not be disregarded, even if not binding on this Court.

11 The County argues that the compensation the Nation received for takings in
12 Tract D means that Tract D was “*not*[] included in the reservation,” ECF No. 43 at
13 49, but this conflates land title ownership with reservation boundaries. *See also*
14 *id.* at 31 n.20, 42 n.25 (same). That the ICC could grant only money for loss of
15 *title*, which is a possessory interest, must be distinguished from the effect of the
16 ICC’s determination of reservation *boundaries*, which are jurisdictional in nature.
17 Indian ownership has been “uncoupled” from Reservation status, *see Solem v.*
18 *Bartlett*, 465 U.S. 463, 468 (1984), and the rule is that “*no matter what happens to*
19 *title* of individual plots within the area,” “[o]nce a block of land is set aside for an
20 Indian reservation . . . *the entire block retains its reservation* status until Congress
21 explicitly indicates otherwise.” *Id.* at 470 (emphasis added). As in this case, it
22 often was necessary for the ICC to determine the boundaries of a reservation in
23 order to identify which lands may subsequently have been taken by the United
24 States. Although the ICC could no more correct a flawed survey of reservation
25 boundaries than it could restore title, the resulting compensation to the Nation was
26 for the loss of *title* to the lands (i.e., representing the proceeds from those land
27 sales which should have been deposited into the Treasury for the benefit of the
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1 Tribe but were not); the Reservation’s exterior boundary remained unchanged.
 2 *See Mattz v. Arnett*, 412 U.S. 481, 497 (1973) (“allotment . . . is completely
 3 consistent with continued reservation status”); *see also* Tr. Ex. 27 at YN 498
 4 (1968 DOI memorandum).

5 The 1981 Survey also best comports with the President’s 1972 Executive
 6 Order, which stated that the 21,000-acre parcel in Tract D was “mistakenly
 7 thought to be public land” when made part of the forest reserve, and directed the
 8 Secretary of the Interior “to assume jurisdiction over the tract of land . . . and to
 9 administer it for the use and benefit of the Yakima Tribe of Indians *as a portion of*
 10 *the reservation created by the Treaty of 1855.*” Tr. Ex. 25 at 2-3 (emphasis
 11 added). The President’s authority to issue that Executive Order was based on the
 12 understanding that the 21,000 acres was within the Reservation, and that President
 13 Roosevelt thus lacked authority to “take” reservation lands when he designated
 14 them as part of the forest reserve. Tr. Ex. 24 at 4. Therefore, if Tract D is found
 15 to be outside the Reservation, it would be at odds with the Executive Order and its
 16 legal underpinnings.

17 **IV. The 1904 Allotment Act Did Not Modify the Reservation Boundary.**

18 The County argues that the 1904 allotment act changed the boundaries of
 19 the Reservation from those established by the 1855 Treaty. ECF No. 43 at 41.
 20 But, “when Congress has once established a reservation all tracts included within
 21 it remain a part of the reservation until separated therefrom by Congress.” *United*
 22 *States v. Celestine*, 215 U.S. 278, 285 (1909). In order to diminish a reservation,
 23 Congress’s intent to do so must be clear and “expressed on the face of the Act or
 24 be clear from the surrounding circumstances and legislative history.” *Mattz*, 412
 25 U.S. at 505. The 1904 Act exhibits neither an express intent nor a context
 26 consistent with diminishment, nor has it ever been considered to have that effect
 27 by Congress itself, the Supreme Court, the ICC, or the Attorney General. *See also*
 28

1 Tr. Ex. 107 at 20- 24 (Defs.’ Response to Interrogatories) (County Defendants
2 conceding that nothing in the statute’s text or surrounding historical circumstances
3 suggest congressional intent to diminish the Reservation).

4 When Congress intended to establish and conclusively define an Indian
5 reservation boundary, it did so explicitly. For example, with the Warm Springs
6 Reservation—which, like the Yakama Reservation, was established pursuant to an
7 1855 Treaty and became the subject of disputed surveys—Congress expressly
8 declared: “That the true north boundary line of the Warm Springs Indian
9 Reservation . . . is hereby declared to be that part of the line run and surveyed by
10 T.B. Handley . . .” 28 Stat. 86 (1894); *see also Chickasaw Nation v. United*
11 *States*, 94 Ct. Cl. 215, 221 (1941) (discussing statute that declared “the boundary
12 line between the State of Arkansas and the Indian country, as originally surveyed
13 and marked . . . is hereby declared to be the permanent boundary between the State
14 of Arkansas and the Indian country”). In other words, Congress knew how to
15 definitely declare a disputed reservation boundary.

16 But in the 1904 Yakama allotment act, Congress merely recognized the
17 Nation’s then-existing claim to 293,837 acres west of the Schwartz line, saying
18 that “said tract shall be regarded as part of the Yakima Indian Reservation for the
19 purposes of this Act . . .” 33 Stat. 595, 596. In other words, lands within this
20 tract could be allotted to tribal members or sold as surplus lands. Although the
21 1904 Act did not address allotment and sale within Tract D, that omission falls
22 well short of demonstrating clearly and unambiguously that the Reservation
23 established by the 1855 Treaty was thereby shrunk to the Barnard line.

24 The surrounding circumstances and legislative history make equally clear
25 that Congress’s intent was to specify which lands were to be allotted and soften
26 the blow of opening the Reservation against the Nation’s wishes—not to establish
27 a southwestern boundary or lay to rest any dispute as to the western boundary.
28

1 The House report accompanying the 1904 Act laments the failure to open the
2 Reservation as “a very great hindrance to the continued and complete
3 development of [Yakima County and the State of Washington]” and states the
4 pressing sense of the House that “this reservation should be opened at once.” Tr.
5 Ex. 20 at 5. But “one of the principal obstacles in the way of securing an
6 agreement with the Yakimas [to open the reservation] was that relating to the
7 adjustment of this boundary dispute.” Tr. Ex. 76 at 5; S. Doc. No. 337, 63rd
8 Cong., 2d Sess. at 155-156 (Dec. 20, 1913) (testimony of B.F. Barge, member of
9 the Flathead-Crow Commission, that the “main difficulty” preventing an
10 agreement for the disposition of surplus lands “was a disputed boundary”). DOI
11 officials recommended Congress “provid[e] for the adjustment of this claim of the
12 Indians for the lands which have been cut off the western portion of their reserve,”
13 whether or not negotiations continued for the cession of lands more broadly. Tr.
14 Ex. 76 (at 5). By agreeing to the Nation’s claim on the western boundary,
15 Congress neutralized one objection to its decision to open the Reservation over the
16 protest of the Tribe. *See, e.g.*, Tr. Ex. 19 at 5783 (House Debate on 1904 Act)
17 (Rep. Sulzer) (“Everybody seems to be in favor of these bills to take away the
18 lands of the Indians but the Indians.”).

19 The notion that the 1904 Act diminished the Yakama Reservation has been
20 explicitly and implicitly rejected on multiple occasions over the last ninety years.
21 The Supreme Court in *Northern Pacific* considered the Treaty in evaluating the
22 western boundary of the Reservation, but did not appear to find the 1904 Act
23 relevant to its analysis. 227 U.S. at 359-66. This proposition was expressly
24 rejected in 1932, when a senior DOI official explained in a letter to the Attorney
25 General that the 1904 statute “specifically relates to the sale and disposition of the
26 surplus or unallotted lands of the Yakima Reservation” and “fails to show
27 anything which could be construed as finally fixing the boundary of the
28

1 reservation or in any way presenting an obstacle to the claim of the Indians for
2 additional land.” Tr. Ex. 52 at KC 820. In 1939, after the Treaty Map was
3 discovered, Congress itself demonstrated that the 1904 Act did not resolve the
4 boundary dispute by appropriating funds for the “completion of a survey of the
5 disputed boundary of the Yakima Reservation.” 53 Stat. 685, 696 (1939). Nor
6 did the ICC find the 1904 Act dispositive of the boundary questions before it. *See*
7 *supra* at Section III.

8 Finally, the Attorney General could not have concluded in 1972 that the
9 President could return 21,000 acres in Tract D to the Yakama Nation if the 1904
10 statute was viewed as congressional diminishment of the Yakama Reservation and
11 establishment of a reservation boundary. If that were the case, the 21,000-acre
12 parcel would *not* have been within the Reservation at the time of the 1907
13 Proclamation reserving the lands for the forest system, and the land could not have
14 been simply returned to the Tribe through Executive action, as the Attorney
15 General concluded was permissible. *See* Tr. Ex. 24 at 6. But although the
16 Attorney General noted that the 1904 statute “recognize[d] the 1899 survey, on
17 the basis of then available evidence,” *id.* at 3, he did not conclude that this statute
18 altered the Treaty boundary.

19 **V. For More Than Fifty Years, Federal Agencies Have Consistently**
20 **Treated Tract D as Within the Reservation.**

21 Since the discovery of the Treaty Map, federal agencies have generally
22 treated Tract D as within the Reservation. This conclusion was reflected in the
23 1932 Calvin survey, see *supra* at pages 8-9, and in the views of federal officials
24 expressed throughout the 1930s. *See, e.g.,* Tr. Ex. 37 at KC 1702-03; Tr. Ex. 52 at
25 KC 825; Tr. Ex. 54 at KC 784. Following the ICC decision, DOI’s Office of the
26 Regional Solicitor provided an extensive analysis of jurisdiction in Tract D. *See*
27 Tr. Ex. 27. That memorandum concluded that the Yakama Tribe had not lost or
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1 ceded jurisdiction over Tract D lands. *Id.* at YN 494. Thus, “until the boundaries
2 of the reservation are changed by congressional action, the land within Tracts C
3 and D remains a part of the Yakima Reservation,” and the Tribe retains authority
4 over its members and treaty rights in this area. *Id.* at YN 498.

5 Since then, this conclusion has been reiterated by DOI officials on multiple
6 occasions. For example, in 1978, Interior Solicitor Leo Krulitz confirmed to
7 Representative Mike McCormack that the town of Glenwood is within the
8 Yakima Indian Reservation. Tr. Ex. 28 at YN 519. Solicitor Krulitz explained
9 that “notwithstanding the diminution of [the Yakama Nation’s] ownership of lands
10 within their reservation, their governmental authority persists.” *Id.* In 1980, the
11 Office of the Regional Solicitor confirmed again that Tract D remained part of the
12 Reservation, and that removal or destruction of boundary signs was prohibited by
13 federal law. Tr. Ex. 30. The status of Tract D as within the Reservation was
14 confirmed again by DOI officials in 1986 in a letter to the Chairman of the
15 Yakima Tribal Council, Tr. Ex. 83, and in 1992 by Solicitor Tom Sansonetti to
16 Representative Sid Morrison. Tr. Ex. 31; *see also* Tr. Ex. 87 (1993 BIA Letter to
17 Representative Inslee).

18 DOI’s operations also reflect this reality. For example, in 1980, the
19 Yakama Nation purchased approximately 180 acres of land within Tract D using
20 funds from the Department of Agriculture Farmers Home Administration Direct
21 Loan Account, which authorizes purchase of lands “within the tribe’s reservation
22 as determined by the Secretary of the Interior.” *See* Pub. L. 91-229 (Apr. 11,
23 1970); Shaw Decl., Exs. E-F. The Yakama Nation purchased an additional 64
24 acres of land using this program and the Secretary of the Interior took those lands
25 into trust in 1985. Shaw Decl., Exs. G-H.

26 Since 1972, DOI’s Bureau of Indian Affairs (BIA) Forestry Program has
27 managed approximately 22,000 acres of lands in Tract D in compliance with
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1 federal statutes and regulations concerning Indian timberlands. BIA's Forestry
2 Program also maintains an office in Glenwood, and has facilitated on-reservation
3 timber sales in Tract D since 1987, harvesting over 111,000,000 board-feet of
4 tribal timber and generating approximately \$16,882,770 in revenue for the
5 Yakama Nation. *See* Shaw Decl. ¶¶ 12-13.

6 The U.S. Environmental Protection Agency ("EPA") has also treated Tract
7 D as within the Reservation. EPA retains authority to implement certain
8 environmental statutes on lands within the limits of any Indian reservation,
9 notwithstanding the issuance of any fee patents. *See, e.g.*, 40 C.F.R. § 49.2(b)
10 (defining reservation for purposes of Clean Air Act (CAA) authority); *id.* § 122.2
11 (Clean Water Act (CWA) authority). EPA has asserted its regulatory authority
12 throughout the Yakama Reservation, including within Tract D. For example, in
13 2003, EPA sent a letter to Public Utility District No. 1 of Klickitat County relating
14 to a notice of violation to the wastewater facility in Glenwood regarding
15 unpermitted discharges in violation of CWA. Tr. Ex. 41. EPA stated that it
16 "understands the clear position of the United States is that the Glenwood facility
17 and other lands within 'Tract D' are within the boundaries of the Yakama Indian
18 Reservation." *Id.* (also noting that the Washington Department of Ecology
19 maintains that Glenwood is within the Reservation). A 2005 letter from EPA to
20 Klickitat County makes the same conclusion about reservation status in the
21 context of whether Washington's CAA State Implementation Plan applies in Tract
22 D, since such plans do not apply within Indian reservations. Tr. Ex. 42. EPA also
23 directly implements the Resource Conservation and Recovery Act Subtitle I
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1 program within Indian County, and has asserted authority over underground
2 storage tanks in Glenwood, within Tract D.³

3 **VI. Affirming the Treaty Boundary as Including Tract D Would Not Cause**
4 **Significant Jurisdictional Changes for Residents of that Area.**

5 Like most reservations, the Yakama Reservation, including Tract D, and
6 specifically the community of Glenwood, contains a mix of Indian and non-Indian
7 residents, and the land includes both non-Indian owned fee land and land held in
8 trust by the United States for the Tribe and its members. Affirming the federal
9 government's longstanding view that Tract D is part of the Reservation will not
10 cause any significant disruptions to the residents of that area, or significantly
11 affect jurisdictional practices there. Tract D remains part of the State of
12 Washington, and state laws will continue to apply to most transactions on fee land
13 involving non-Indians. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 362 (2001).
14 States have jurisdiction over non-Indians on reservations unless such jurisdiction
15 is preempted by federal law or would unlawfully infringe "on the right of
16 reservation Indians to make their own law and be ruled by them." *White*
17 *Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980). In contrast,
18 tribes have more limited authority over non-Indians within reservations,
19 particularly on non-Indian fee land. *Plains Com. Bank v. Long Family Land and*
20 *Cattle Co.*, 554 U.S. 316, 327-28 (2008).

21 In particular, state laws will generally continue to apply to nonmember
22 activities on fee lands in matters as diverse as liquor sales, *see Rice v. Rehner*, 463
23 U.S. 713 (1983); zoning and building regulation, *see Brendale v. Confederated*
24 *Bands and Tribes of the Yakima Nation*, 492 U.S. 408 (1989), and most business
25

26
27 ³ See [https://www.epa.gov/sites/production/files/2019-02/r10-ust-lust-10-17-](https://www.epa.gov/sites/production/files/2019-02/r10-ust-lust-10-17-18.xlsx)
28 [18.xlsx](https://www.epa.gov/sites/production/files/2019-02/r10-ust-lust-10-17-18.xlsx).

1 regulation, *see, e.g. Montana v. United States*, 450 U.S. 544, 565-66 (1981)
2 (addressing when tribes may regulate nonmember activity on fee lands). It also
3 seems unlikely that State or County taxation authority would be significantly
4 affected, since states also may generally collect nondiscriminatory taxes on sales
5 to non-Indians, even by certain Indian businesses, unless otherwise preempted.
6 *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation*, 447
7 U.S. 134 (1980). Klickitat County appears to collect real property taxes assessed
8 on non-Indian-owned fee lands throughout the County—including within Tract
9 D—as well as other tax levies on behalf of the County and on behalf of junior
10 taxing districts. *See* Tr. Exs. 580, 583. It is not clear why the County’s receipt of
11 these revenues, or County services, would change based on judicial confirmation
12 of reservation status. *See, e.g., County of Yakima v. Confederated Tribes and*
13 *Bands of Yakima Indian Nation*, 502 U.S. 251 (1992).

14 As to criminal jurisdiction, Indian country status is irrelevant to jurisdiction
15 over crimes between non-Indians, *e.g., United States v. Antelope*, 430 U.S. 641,
16 643 n. 2 (1977), and the State of Washington maintains certain civil and criminal
17 jurisdiction within the boundaries of the Yakama Reservation. *See generally*
18 *Yakima Indian Nation*, 439 U.S. at 465-66; *Confederated Tribes and Bands of the*
19 *Yakama Nation v. City of Toppenish*, No. 18-3190 (E.D. Wash. Feb. 22, 2019).
20 The federal government also has criminal jurisdiction over offenses involving
21 Indians within reservations pursuant to the General Crimes Act, 18 U.S.C. § 1152,
22 and the Major Crimes Act, *id.* § 1153. Tribes retain jurisdiction over “offenses
23 committed by one Indian against the person or property of another Indian,” *id.* §
24 1152, but the Major Crimes Act provides for federal jurisdiction over an Indian
25 who has committed, in Indian country, enumerated serious crimes, whatever the
26 status of the victim. *Id.* § 1153. The federal Juvenile Justice and Delinquency
27 Act, 18 U.S.C. § 503, extends federal jurisdiction over juvenile defendants in
28

1 these cases, and the Assimilative Crimes Act, 18 U.S.C. § 13, empowers the
 2 federal government to fill any gaps in federal criminal law with laws from the
 3 state where the federal land is situated. As a result, and particularly given the
 4 small population of Tract D, the United States does not anticipate any gaps in the
 5 ability of the various jurisdictions to enforce criminal laws in this area. However,
 6 if jurisdictional disputes arise regarding any of these matters, tribes, state, and
 7 municipalities frequently negotiate intergovernmental agreements, such as cross-
 8 deputization agreements, to address these issues. *See, e.g. Hicks*, 533 U.S. at 393
 9 (noting the “host of cooperative agreements between tribes and state authorities”).

10 Thus, the affirmation that Tract D is a part of the Yakama Indian
 11 Reservation is unlikely to have significant effects on the residents of that area, and
 12 any jurisdictional overlap or disputes could be resolved between the State,
 13 County, and Tribe, as appropriate.

14 CONCLUSION

15 For the foregoing reasons, the Court should find that the 1981 Survey,
 16 which includes Tract D, represents the southwestern boundary of the Yakama
 17 Indian Reservation.

18 Respectfully submitted,

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JUNE 13, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

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